Appendix A

During the trial, the trial Court did the following:

(a) Rejected as inadmissible all evidence and testimony offered by the petitioners to show the terms, origins, nature, purpose and scope of the conspiracy and combination of the respondents from 1933, the year in which appellants alleged the conspiracy was formed, to 1938, on the grounds that petitioner entered this country in 1938 (R. 112-113, 118-119; Offer of Proof, R. 308-327; 422-434; 151-152, 194; 256-268; 601-603; 1985-1986);

(b) Rejected all evidence pertaining to respondents' suppression of petitioners' Canadian business as part of their overall conspiracy and the exclusion of petitioners from Canadian Markets (R. 801-808; 831-838; Offer of Proof, R. 801-840);

(c) Rejected as inadmissible evidence that respondent Union Carbide informed petitioners that they had no business in the vanadium industry, threatened petitioners to stay away from Climax Molybdenum Co., a manufacturing associate of petitioners which produced petitioners' product, or reprisals would be taken against Climax (R. 813-818; 826-834; 845-851; 1008-1012);

(d) Excluded evidence offered by petitioners as to their overall business success and their ability to succeed in other allied fields of ores, minerals and alloys (Pl. Ex. 121 for Id.; R. 469; 1087; Pl. Ex. 123 for Id.; R. 536, 1097; Pl. Ex. 124 for Id.; 537, 1103; Pl. Ex. 125 for Id.; R. 539, 1106; Pl. Ex. 126 for Id.; R. 541; 1106; Pl. Ex. 139-141 for Id., R. 543-545, 1260-1264);

(e) Persistently told the jury that activities in prima facie violation of the antitrust laws were "good business judgment", a "good proposition", and not "improper". (R. 209, 245, 246, 558, 561, 586.) In effect, these statements amounted to an instruction to the jury that good business judgment was an absolute defense to Sherman Act violations. (R. 1909-1910; 245, 246, 255, 256, 561, 563, 586, 611, 869, 1647, 1709, 1833.) This error was magnified in its instructions, when the Court told the jury that ". . . You cannot find that the defendants entered into an unlawful agreement or conspiracy because you disagree with their business judgment." (R. 2029.) The trial Court failed to qualify its instructions on individual business judgment (R. 2028-2029);

(f) Instructed the jury on the public injury doctrine specifically rejected by this Court in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961). (R. 2035-2036.) In fact, the "public injury" instruction offered by respondents and given by the trial Court specifically cited the Ninth Circuit *Klor's* decision which this Court unanimously overruled;

(g) Erroneously instructed the jury that any acts of the respondents as agents of the Government, American or Canadian, could not be considered by the jury as part of the illegal agreement, plan or monopolization herein involved (R. 2033);

(h) Required petitioners to prove damages to a reasonable certainty and to prove that, but for the conspiracy, petitioners would have had vanadium products to sell and would have sold them at a profit. (R. 2032.) In so

doing the trial Court in complete seriousness stated "But somebody has to start reversing the Supreme Court" (R. 2011);[33]

(i) Refused to instruct the jury that a conspiracy to refuse to deal was per se illegal (R. 2031);

(j) Repeatedly questioned the materiality and import of petitioners' evidence (R. 221, 249, 325, 599, 751, 753, 1323, 1324, 1581, 1603, 1621, 1644, 1646, 1656, 1801, 1909-1911, 1924, 1979, 1984), and, to petitioners' prejudice, continuously minimized and questioned the weight and credibility of petitioners' evidence and witnesses. (R. 560, 561, 1413-1414, 1422, 1581, 1804, 1904, 1910, 1962-1963.) By its unwarranted interference in these respects, the trial Court prevented petitioners from making a full, orderly and fair presentation of their case, and gave the jury an impression that their decision should be for respondents;

(k) Permitted counsel for respondent VCA to inform the jury in his opening statement that these same respondents had been acquitted in a prior government suit based on these same facts. (R. 111.)

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[33]"Mr. Alioto. I would suggest this, if your Honor please; it has been done in other cases, and we have done it pretty usually in our proposed instructions: Just take that instruction from the *Bigelow* case and give it directly and verbatim. No one can object to the language of Justice Stone . . . The Court. Yes. But somebody has to start reversing the Supreme Court. (R. 2011.)"